Nos 07-73415 & 07-73987 (Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIERRA CLUB, ET AL
Petitioners

v

U S DEPARTMENT OF TRANSPORTATION ET AL
Respondents

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC ,
Petitioner,

v

U S DEPARTMENT OF TRANSPORTATION, ET AL ,
Respondents

ON PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

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BRIEF FOR RESPONDENTS

JURISDICTIONAL STATEMENT

Petitioners challenge the decision of the Federal Motor Carrier Safety Administration ("FMCSA" or "the agency"), a component of the Department of Transportation ("DOT"), to proceed with a Demonstration Project that will allow up to 100 Mexico-domiciled motor carriers to transport goods between Mexico and the United States This Court has jurisdiction under 28 U S C 2342(3)(A)

FMCSA published its decision to proceed with the Demonstration Project in the Federal Register on August 17 2007 72 Fed Reg 4623 (Aug 17 2007 (ER 1-27)) [1] On August 29 2007, Sierra Club filed a petition for review of that decision See Docket in No 07-73415

FMCSA granted operating authority to the first participant in the Demonstration Project on September 6, 2007 OOIDA ER Tab 1 [2] Asserting that this later step constituted final action by the agency with respect to the Demonstration Project, the Owner-Operator Independent Drivers Association Inc ("OOIDA") filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit on September 7, 2007 OOIDA ER Tab 7 The D C Circuit granted OOIDA's unopposed motion to transfer that petition to this Court Order of Oct 2 2007 Owner-Operator Indep Drivers Ass'n v FMCSA (D C Cir No 07-1355) On October 15 2007 Sierra Club filed an amended petition for review making clear that its challenge to the Demonstration Project included the agency's actions to initiate

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[1] "ER" refers to the Excerpts of Record filed in No 07-73415 We refer to the petitioners in that case collectively as "Sierra Club " Those petitioners include as well Public Citizen, the Environmental Law Foundation, the International Brotherhood of Teamsters and the Brotherhood of Teamsters Auto and Truck Drivers, Local 70

[2] "OOIDA ER" refers to the Excerpts of Record filed by the Owner-Operator Independent Drivers Association in No 07-73987

or implement the Project See Docket in No 07-73415 This Court has consolidated the two petitions Id

Regardless of whether the agency's decision to undertake the Demonstration Project was final on August 17, 2007, upon publication of the Federal Register notice, or only on September 6 2007 when the first grant of operating authority to a participant was issued, both petitions for review were filed within 60 days of such final action Both are therefore timely under 28 U S C 2344

STATEMENT OF THE ISSUES

1 Whether petitioners have carried their burden to establish standing

2 Whether the Demonstration Project is designed to achieve a level of safety on U S highways at least equivalent to that prevailing before the Project began and whether the Project meets all other conditions that Congress imposed on this test of cross-border long-haul operations by Mexico-domiciled carriers

3 Whether the Demonstration Project is consistent with all generally applicable safety statutes

STATEMENT OF THE CASE

To begin implementing its commitment under the North American Free Trade Agreement ("NAFTA") to end a 25-year moratorium on long-haul trucking by Mexican carriers in the United States the Department of Transportation initiated a one-

year Demonstration Project that will allow up to 100 Mexico-domiciled carriers to transport goods from Mexico to destinations throughout this country and to carry U S cargo to Mexico Sierra Club and the Owner-Operator Independent Drivers Association filed petitions for review challenging the Demonstration Project on a variety of statutory grounds Both petitioners sought emergency stays to halt the Project, Sierra Club in this Court and OOIDA in the D C Circuit Such relief was denied in both circuits

STATEMENT OF FACTS

A Statutory Background

Congress approved long-haul trucking by Mexico-domiciled carriers to destinations in the United States when it approved NAFTA, but since then has imposed a variety of specific conditions on such operations Those conditions apply to Mexican carriers participating in the Demonstration Project [3]

1 Section 350 Of The 2002 DOT Appropriations Act

Section 350 of the Department of Transportation and Related Agencies Appropriations Act for Fiscal Year 2002 Pub L No 107-87, 115 Stat 833 864 ("section 350"), prohibited FMCSA from using funds to review or process applications from Mexico-domiciled motor carriers to operate beyond limited

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[3]The statutes discussed below are reproduced in the Addendum to this brief We describe here their most salient provisions

commercial zones along the U S -Mexico border until certain conditions were met The terms of section 350 have been reenacted in each subsequent DOT appropriations act Among section 350's most significant requirements are the following

FMCSA must perform a pre-authorization safety audit ("PASA") of any Mexico-domiciled carrier before that carrier is allowed to engage in long-haul operations in the United States Section 350(a)(1)(A) To pass such an audit, the carrier must have a drug and alcohol testing program consistent with the standards imposed on U S carriers The carrier must also provide proof of insurance and meet numerous other requirements All of its vehicles that do not already have a Commercial Vehicle Safety Alliance decal ("safety decal")[4] must be inspected, and every driver that will operate in the U S must have a valid commercial drivers license issued by Mexico Section 350(a)(1)(B) On-site audits in Mexico must cover at least 50 percent of all individual carriers engaged in cross-border long-haul operations and a sufficient number of carriers to account for 50 percent of estimated cross-border traffic by Mexico-domiciled trucks Id In addition, any Mexico-domiciled truck seeking to enter the

[4]These decals are based on satisfaction of inspection criteria developed by FMCSA in conjunction with the Commercial Vehicle Safety Alliance an association of U S States Canadian Provinces, and Mexico Members of the association agree to use these standards for inspecting commercial motor vehicles in their jurisdictions See Section 350(a)(5) 49 C F R 350 105

United States that does not have a safety decal issued within the previous 90 days must pass an inspection at the border administered by a certified U S inspector before being allowed to proceed Section 350(a)(5) The PASA and decal requirements are not imposed on U S or Canadian carriers

Further cross-border long-haul operations by Mexico-domiciled trucks cannot begin until (1) DOT's Inspector General ("IG") conducts a comprehensive review of the adequacy of inspection capacity information infrastructure, enforcement capability and other specific factors relevant to safe operations by Mexico-domiciled trucks in this country, and (2) the Secretary of Transportation ("the Secretary") in writing addresses the IG's findings and certifies that the opening of the border poses no safety risk Section 350(c) The IG must conduct similar reviews at least annually thereafter Section 350(d)

2 The 2007 Act

Section 6901 of the U S Troop Readiness Veterans' Care, Katrina Recovery and Iraq Accountability Appropriations Act, 2007 ("the 2007 Act") Pub L No 110-28, 121 Stat 112, 183, provides that, before DOT may obligate or expend any funds to grant authority for Mexico-domiciled trucks to engage in cross-border long-haul operations it must conduct a test of such authority that meets the standards in the statutory provision

governing all DOT "pilot programs" (49 U S C 31315(c) ("the pilot program provision")) 2007 Act, §6901(a)(1)-(2) In addition, "simultaneous and comparable authority to operate within Mexico" must be "made available" to U S carriers Id at §6901(a)(3)

Further before the required test can begin, the IG must submit a report to Congress verifying that DOT has complied with the requirements of section 350(a) Id at §6901(b)(1) The Secretary must take any actions that are necessary to address issues raised by the IG and must detail those actions in a report to Congress Id at §6901(b)(2)(A) The 2007 Act also directs the IG to submit an interim report to Congress six months after the program begins and a final report after it is completed addressing the program's adequacy as a test of safety Id at §6901(c)

Also as a precondition to beginning the mandated pilot program the Secretary must provide an opportunity for public comment by publishing in the Federal Register information on the pre-authorization safety audits "conducted before and after [enactment of the 2007 Act] of motor carriers domiciled in Mexico that are granted authority to operate beyond [the border commercial zones] " Id at §6901(b)(2)(B) The Secretary must in addition publish for comment the standards that will be used to evaluate the program, as well as "a list of Federal motor

carrier safety laws and regulations, including commercial drivers license requirements, for which [she] will accept compliance with corresponding Mexican law or regulation as the equivalent to compliance with the United States law or regulation " Id For each such Mexican requirement the notice must include "an analysis of how the corresponding United States and Mexican laws and regulations differ " Id

3 The Pilot Program Provision

The Secretary has general authority to "conduct pilot programs to evaluate alternatives to regulations relating to, or innovative approaches to motor carrier, commercial motor vehicle, and driver safety " 49 U S C 31315(c)(1) Such a program "may include exemptions" from otherwise applicable regulations if it also includes "at a minimum the elements described in paragraph (2) [of the pilot program provision] " Id

Paragraph (2) states a general standard for permissible pilot programs and lists specific elements they must contain Such a program must have "safety measures * * * [that] are designed to achieve a level of safety that is equivalent to or greater than, the level of safety that would otherwise be achieved through compliance with [49 U S C ch 313, concerning commercial motor vehicle operators] or [49 U S C] section 31136 [establishing minimum safety standards for commercial motor

vehicles] " 49 U S C 31315(c)(2)(A) More specifically, such programs must involve "[a] reasonable number of participants necessary to yield statistically valid findings " Id at §31315(c)(2)(C) The maximum duration of a pilot program is three years Id at §31315(c)(2)(A)

A pilot program may be initiated only after the Secretary publishes a detailed description of it in the Federal Register and provides an opportunity for public comment Id at §31315(c)(1)

B Relevant Facts

Until 1982, Mexico- and Canada-domiciled motor carriers could operate in the United States provided that they qualified for U S operating authority under Interstate Commerce Commission regulations See Department of Transp v Public Citizen 541 U S 752, 759 (2004) ("Public Citizen") Prompted by complaints that U S motor carriers were not allowed the same access to Mexican and Canadian markets that carriers from those nations enjoyed in this country (id), Congress imposed a moratorium on the issuance of new grants of operating authority to motor carriers domiciled in Canada or Mexico or owned or controlled by persons of those countries See Bus Regulatory Reform Act of 1982 Pub L No 97-261 § 6(g) 96 Stat 1102, 1107

While the disagreement with Canada was quickly resolved, the issue of trucking reciprocity with Mexico was not Public Citizen, 541 U S at 759 As a result, since 1982, most Mexican carrier operations within the United States have been limited to the commercial zones adjacent to the U S -Mexico border [5] Mexico-domiciled trucks and buses cross into those commercial zones about 4 5 million times yearly 72 Fed Reg 46,263, 46 264 (Aug 17, 2007) Data collected from the border zones suggest that Mexican carriers are as safe (or perhaps even safer) than their American counterparts See 70 Fed Reg 50 277 50 283 (Aug 26 2005) (table showing consistent decline in regulatory out-of-service rates for Mexico-domiciled commercial vehicles operating in U S for years 1999-2005, with Mexican rate falling below rate for U S vehicles in 2005) 72 Fed Reg at 46,269 (table showing declining out-of-service rates for drivers employed by Mexico-domiciled carriers operating in commercial zones in years 2001-2006) [6]

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[5]As explained below certain categories of Mexico-domiciled carriers were not covered by the moratorium and have been free to operate beyond the border commercial zones See infra at 25-26

[6]These rates overstate the likely extent of potential safety problems because they are based on inspections that are themselves typically triggered either by concerns about a particular carrier's safety record or by vehicle characteristics that suggest an above-average safety risk See 70 Fed Reg at 50,283

In NAFTA, which entered into force on January 1, 1994 the United States agreed to phase out the moratorium on licensing Mexico-domiciled motor carriers to operate beyond the border zones See Public Citizen, 541 U S at 759 Based on concerns relating to the adequacy of Mexican motor carrier safety regulation, however the United States announced in late 1995 an indefinite delay in opening the border to long-haul Mexican commercial motor vehicles Public Citizen 541 U S at 760

Mexico filed complaints against the United States under NAFTA's dispute resolution provisions, challenging the delay An arbitration panel issued a report in February 2001 concluding that the blanket refusal to process applications of Mexico-domiciled long-haul carriers breached NAFTA Id After the President responded to the arbitration panel decision by announcing the United States' intent to resume the process for implementing NAFTA Congress enacted section 350 which (as already discussed) imposed threshold conditions to be met before the Secretary could authorize any Mexico-domiciled motor carriers to operate beyond the border commercial zones Several of those conditions were satisfied by a rule published by FMCSA in March 2002 establishing a new application process for Mexico-domiciled long-haul carriers and mandating pre-authorization safety audits for all such carriers See 67 Fed Reg 12 702 (Mar 19 2002) At the same time the agency published a rule implementing a

safety monitoring system for Mexico-domiciled carriers operating in the U S 67 Fed Reg 12,758 (Mar 19, 2002)

Satisfying another requirement of section 350 the Secretary certified in November 2002 that operations by Mexico-domiciled carriers beyond the border commercial zones would not pose an unacceptable safety risk to the American public The President subsequently modified the 1982 moratorium to permit such operations 67 Fed Reg 71 795 (Nov 27 2002) Ongoing litigation over the validity of FMCSA's implementing regulations prevented the President's action from immediately taking effect, however Those regulations were vacated by this Court in January 2003 but reinstated after the Supreme Court's Public Citizen decision in June 2004 541 U S at 752

Thereafter, and following consultations with Mexico over details of implementing reciprocal long-haul carrier access in each country, the U S Secretary of Transportation and Mexico's Secretary of Communications and Transportation announced on February 23 2007 a Demonstration Project to implement the trucking provisions of NAFTA The Project's purpose is to demonstrate both the ability of Mexico-domiciled motor carriers to comply with U S laws and regulations and the effectiveness of DOT's monitoring and enforcement mechanisms which together ensure that Mexican carriers operating in the United States can maintain the same level of highway safety as U S -based carriers

On May 1, 2007, FMCSA published notice of the Demonstration Project in the Federal Register 72 Fed Reg 23,883 The agency explained that the Demonstration Project will allow up to 100 Mexico-domiciled carriers to operate between Mexico and destinations throughout the United States for one year Similarly, the Government of Mexico has committed to grant up to 100 U S -domiciled property carriers reciprocal rights to operate in Mexico The agency explained that participating Mexican carriers and drivers will be required to comply with all motor carrier safety laws and regulations and all other applicable U S laws and regulations Id at 23,884 Motor carriers transporting passengers and hazardous materials are not permitted to participate in the Project Id at 23 885

The agency further stated that the safety performance of participating carriers will be tracked closely not only by FMCSA and its State partners but also by a joint U S -Mexico monitoring group and an evaluation panel independent of DOT See id at 23,886 (describing composition and functions of these groups) FMCSA indicated that the resulting data would be considered carefully before decisions were made concerning further implementation of NAFTA's trucking provisions Id

On May 25, 2007, before the comment period for the May 1 notice ended the President signed into law the 2007 Act Shortly thereafter, to comply with the new statute's

requirements, FMCSA published a notice further describing the Demonstration Project That notice outlined specific U S and Mexican regulations in three areas where Mexican regulations or processes would be accepted as meeting U S requirements In addition, the notice contained tables providing information about and results of all PASAs of Mexican carriers already completed 72 Fed Reg 31,877 (June 8, 2007) FMCSA subsequently published its response to the comments received and provided notice of its intent to proceed with the Demonstration Project, contingent upon completion of the IG report and any necessary follow-up action 72 Fed Reg 46 263 (Aug 17, 2007)

Sierra Club filed a petition for review on August 29, 2007 and sought an emergency stay of the Demonstration Project This Court denied that stay request two days later, finding that "[p]etitioners have not satisfied the legal requirements for a stay pending review of the petition " Order of Aug 31 2007

As required by the 2007 Act DOT's Inspector General sent to Congress a report on issues pertaining to the Demonstration Project on September 6, 2007 OOIDA ER Tab 11 Also on September 6, after responding to the report's concerns in a letter to Congress (ER 52-57) [7] the Secretary announced the start

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[7]The IG's standard practice is to share audit results with DOT before the audit's public release, so that the agency can review and respond to them See ER 53 This allowed the IG report and the Secretary's response to be transmitted to Congress (continued)

of the Demonstration Project and granted operating authority to the first Mexico-domiciled carrier OOIDA ER Tab 1

The following day, OOIDA filed its petition for review in the United States Court of Appeals for the District of Columbia Circuit, and sought an emergency stay of the roll-out of the Demonstration Project The D C Circuit denied the stay request on the ground that "[p]etitioner has not satisfied the stringent standards required for a stay pending review " OOIDA ER Tab 8 In light of the pending Ninth Circuit petition for review, the D C Circuit transferred the case to the Judicial Panel on Multidistrict Litigation The D C Circuit subsequently granted OOIDA's motion to transfer its petition to this Court, which consolidated the two petitions for review See supra at 2

SUMMARY OF ARGUMENT

1 Neither Sierra Club nor OOIDA has demonstrated the injury in fact necessary to establish Article III standing because neither has shown that its members face any particularized harms resulting from the Demonstration Project The two declarations submitted by Sierra Club offer nothing more than the speculative conclusion that granting a limited number of Mexico-domiciled trucks broader access to U S highways will cause an increased likelihood of road accidents (a factual

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[7] (continued)
on the same day

assertion contradicted by regulatory enforcement statistics collected by FMCSA) And OOIDA has presented neither declarations nor any other evidence

2 Congress has enacted multiple statutes containing preconditions for any test of opening the border to long-haul operations by Mexico-domiciled trucks In extensive Federal Register notices, FMCSA has explained how the Demonstration Project challenged here meets each of those preconditions

As a threshold matter petitioners' arguments about lack of equivalent safety protection ignore that, prior to the Demonstration Project, FMCSA regulations already incorporated the agency's longstanding policy that commercial drivers' licenses issued in Mexico are equivalent to those issued by States in this country This together with the fact that U S requirements apply with full force to Demonstration Project participants in all other significant respects means that the Project is well designed to maintain the baseline level of highway safety prevailing under existing U S regulations

Even though the Demonstration Project grants no exemptions from U S requirements the agency carefully compared the Mexican and U S regulatory regimes in its rulemaking notices Those notices explain why the specific features of the Demonstration Project meet the standard of equivalent safety as well as all

other requirements imposed by Congress as conditions of opening the border to long-haul trucks domiciled in Mexico

3 None of the generally applicable statutes concerning commercial vehicles and their operation upon which petitioners rely poses any impediment to continuation of the Demonstration Project

Participating trucks are not "imports" and thus need not bear a label certifying their compliance with Federal Motor Vehicle Safety Standards under 49 U S C 30112 and 30115 DOT announced in 2005 that it would use other enforcement tools to ensure that Mexico- and Canada-domiciled trucks engaged in cross-border trade meet those standards Petitioners can no longer mount a timely challenge to that enforcement policy decision which, in any event is fully consistent with the certification requirement

The Demonstration Project likewise need not comply with 49 U S C 31315(b) governing "exemptions" from regulatory requirements Section 31315 as a whole establishes three mutually exclusive mechanisms -- waivers exemptions and pilot programs -- through which DOT can authorize departures from regulatory requirements Congress mandated in the 2007 Act that the Demonstration Project comply with the requirements for pilot programs and the distinct statutory procedures for obtaining exemptions are irrelevant to the Project

Finally, petitioners have not shown that the Demonstration Project is unlawful under 49 U S C 31149, which was enacted in 2005 and requires commercial drivers to pass medical examinations *administered by examiners included on a registry established by* the Secretary DOT has not issued regulations implementing §31149 and the registry it contemplates does not yet exist Accordingly, the provision's requirements are not yet enforced against any U S carrier The petitions for review in this case do not challenge the absence of implementing regulations as agency action unreasonably delayed Without making, and prevailing on such a challenge, petitioners cannot show that DOT has unlawfully failed to enforce §31149 against participants in the Demonstration Project

STANDARD OF REVIEW

In a challenge brought pursuant to the Hobbs Act, 28 U S C 2342, agency action can be set aside if it is "arbitrary capricious, an abuse of discretion or otherwise not in accordance with law " 5 U S C 706(2)(A) see also ICC v Bhd of Locomotive Eng'rs, 482 U S 270 282 (1987) (Administrative Procedure Act provides standard of review in Hobbs Act cases) This standard is "extremely narrow," Postal Serv v Gregory 534 U S 1, 7 (2001) and an agency must only "articulat[e] a rational connection between the facts found and the choice made " Ariz Cattle Growers' Ass'n v Fish & Wildlife Serv , 273 F 3d

1229, 1236 (9th Cir 2001) Once an agency has properly invoked its delegated authority to construe an ambiguous federal statute, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency " Chevron U S A , Inc v NRDC 467 U S 837, 844 (1984)

ARGUMENT

I PETITIONERS HAVE NOT MET THEIR BURDEN TO ESTABLISH STANDING

To establish Article III standing a petitioner must demonstrate that it has "suffered a concrete and particularized injury that is either actual or imminent that the injury is fairly traceable to the defendant and that it is likely that a favorable decision will redress that injury " Massachusetts v EPA, 127 S Ct 1438, 1453 (2007) An organization like OOIDA the Sierra Club or the Teamsters has standing if it shows among other things, that its members "would otherwise have standing to sue in their own right " Hunt v Wash State Apple Adver Comm'n 432 U S 333, 343 (1977) Standing is "substantially more difficult to establish" when a litigant "is not himself the object of government action or inaction he challenged " Lujan v Defenders of Wildlife, 504 U S 555 562 (1992)

A petitioner challenging agency action in a court of appeals bears the same evidentiary burden as "a plaintiff moving for summary judgment in the district court it must support each

element of its claim to standing 'by affidavit or other evidence '" Sierra Club v EPA, 292 F 3d 895, 899 (D C Cir 2002) (quoting Lujan, 504 U S at 561) This Court has held that the injury in fact requirement is satisfied if a litigant proffers evidence showing that a regulatory decision creates a "significant risk" that he will be harmed Central Delta Water Agency v United States, 306 F 3d 938 948 (9th Cir 2002) id at 949 (finding standing based on "modeling prepared by the Bureau [of Reclamation] itself" and on "reports * * * documenting the negative effects of increased salinity on the various crops that [plaintiffs] grow")

Petitioners here have not met their burden of demonstrating injury in fact OOIDA has not even attempted to show "by affidavit or other evidence" that its members face any particularized harms Lujan, 504 U S at 561 And the two declarations that Sierra Club has submitted "fai[l] to explain" why the Demonstration Project "presents a credible threat to its members' health " Nuclear Info & Res Serv v NRC 457 F 3d 941 953 (9th Cir 2006) The declarations offer no evidence to support the speculative conclusion that permitting a limited number of Mexico-domiciled trucks additional access to our highways will cause an increased likelihood of injury See 72 Fed Reg at 46,268 (noting that "the number of Mexico-domiciled carriers and vehicles that will participate in

the demonstration project is extremely small compared to the population of carriers and vehicles currently operating in the commercial zones") [8] As described above, DOT has compiled and published safety data demonstrating that drivers from Mexico-domiciled carriers are as safe as, or safer than, their U S counterparts See supra, at 10 Sierra Club's declarations do not contradict those data, indeed they do not mention even the data included in the August 17, 2007 notice, see 72 Fed Reg at 46,269

Instead, Sierra Club speculates that truck drivers "will face an increased risk of accidents due to any problems with Mexico-domiciled trucks that do not meet U S safety standards and Mexico-domiciled trucks who do not comply with U S safety regulations " Kimball Decl ¶8 see Gonzalez Decl ¶5 But neither of Sierra Club's declarations identifies any standards or regulations that the Demonstration Project permits Mexico-domiciled trucks to ignore Nor do petitioners offer evidence linking the failure to meet a particular safety standard to a "significant risk" of future injury See Allen v Wright 468 U S 737, 759 (1984) (rejecting standing because of a failure

[8] See also Public Citizen, Inc v NHTSA, 489 F 3d 1279 1293 (D C Cir 2007) (requiring Public Citizen to provide evidence to support its allegation "that several hundred Americans including some Public Citizen members, will annually be injured in car crashes who would not be injured if NHTSA complied with [a statutory requirement]")

to "lin[k] * * * the challenged Government conduct and the asserted injury") In the absence of anything more than these "general averments" and "conclusory allegations," Lujan v Nat'l Wildlife Fed'n, 497 U S 871, 888 (1990), and not even that for OOIDA, petitioners have not demonstrated standing [9]

One of Sierra Club's declarants, a truck driver and foreman, also states that he is "concerned" that the Demonstration Project will undermine his and his co-workers' job security especially if the restrictions on point-to-point deliveries are not properly enforced Gonzalez Decl ¶5 But the declarant provides no evidence that increased competition resulting from a small and temporary demonstration project will create a "significant risk" that a U S trucker will be fired Central Delta Water Agency 306 F 3d at 948 The causal link between the Demonstration Project and the declarant's employment prospects is therefore too attenuated to support standing See Simon v Eastern Kentucky Welfare Rights Org , 426 U S 26, 42-43 (1976) [10]

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[9]Sierra Club's reliance on Covington v Jefferson Cty , 358 F 3d 626, 639 (9th Cir 2004), is misplaced In Covington a family living across from a county dump sued the dump over its failure to comply with federal waste regulations This Court noted that the risk of "[f]ires explosions vectors scavengers and groundwater contamination * * * are in no way speculative when the landfill is your next-door neighbor " Id at 638 In contrast the available data suggest that the risk of injury to U S truckers from the Demonstration Project is, at best remote

[10]Both declarations also include a short paragraph noting the Teamsters' desire "to receive information about the pilot (continued)

II THE DEMONSTRATION PROJECT SATISFIES THE FUNDAMENTAL STATUTORY STANDARD OF EQUIVALENT SAFETY PROTECTION AND ALL OTHER PROJECT-SPECIFIC STATUTORY REQUIREMENTS

Even if petitioners had demonstrated standing to sue, they could not prevail on the merits This case is not about whether the U S has complied with its obligation under NAFTA to open the border to long-haul Mexico-domiciled motor carriers Nor does the case concern whether the specific features of the Demonstration Project challenged here are necessary to fulfill that obligation There is no dispute that NAFTA requires the United States to open its southern border to long-haul Mexican trucks and that under the 2007 Act, such opening must begin with a pilot program that adheres to the requirements of that statute This Court thus must decide whether the Demonstration Project satisfies the preconditions that Congress has established for allowing Mexico-domiciled carriers to operate beyond the border commercial zones [11]

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[10](continued)
program" and its safety implications Kimball Decl ¶9 Gonzalez Decl ¶7 Neither declarant claims, however, that DOT failed to provide him with information that he wanted or was entitled to

[11]Contrary to OOIDA's contention (OOIDA Br 19-27), whether the Project is required to meet U S national treatment obligations under NAFTA is irrelevant to those statutory questions Nonetheless we note that the Demonstration Project is an essential component of DOT's plans for implementing the U S NAFTA obligation on cross-border trucking To the extent that OOIDA is asking this Court to determine that the Demonstration Project violates NAFTA its argument is barred by statute See 19 U S C 3312(c)(2) (precluding private parties (continued)

The most serious allegations leveled by petitioners pertain to the statutory mandate that "the safety measures in the [Demonstration Project be] designed to achieve a level of safety that is equivalent to, or greater than, the level of safety that would otherwise be achieved through compliance with [existing federal regulations regarding commercial motor vehicles and their operators] " 49 U S C 31315(c)(2) Sierra Club and OOIDA speculate that the numerous safety measures incorporated in the Project are inadequate to satisfy this mandate, arguing that DOT has not adequately explained why it will accept several different Mexican requirements as equivalent to U S requirements

These arguments suffer from two fundamental defects that taken together, dispose of petitioners' claims First, the safety-equivalence standard in §31315(c)(2) requires that the Project be designed to achieve a safety level equal to that prevailing under existing federal safety regulations Those existing regulations already recognize and accept Mexican commercial drivers licenses (CDLs) as equivalent to U S licenses -- which is why Mexican carriers can operate freely in the border zones and in some cases beyond See 49 C F R 383 23(b) n 1 see also 57 Fed Reg 31,454 (July 16 1992) 54 Fed Reg 22,392 (May 23, 1989) 54 Fed Reg 22 285 (May 23 1989) In all other

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[11](continued)
from challenging agency action on the ground that it is inconsistent with NAFTA)

significant respects, U S requirements apply with full force to participants in the Demonstration Project See 72 Fed Reg at 46 276 ("This demonstration project does not provide Mexico-domiciled motor carriers with exemptions from any of the Agency's regulations * * * nor will the project test any innovative approaches to regulation ") Contrary to petitioners' claims, then, the Project does not relax U S regulations for participants, nor does it accept any Mexican regulations as equivalent to U S requirements that were not already deemed equivalent Rather it simply lifts pre-existing geographic limitations on cross-border trucking for a limited number of Mexican carriers and imposes additional layers of safety monitoring upon those carriers decisions that are not anticipated to diminish safety in any way See 72 Fed Reg at 46,265, 46,276

Second Mexico-domiciled carriers have long operated in this country, and DOT has been able to collect extensive data showing that Mexican carriers today are no less safe and are in some cases even safer than their U S counterparts For example, several categories of Mexico-domiciled carriers have always been permitted to operate in the U S without geographic restriction These include (1) Mexico-domiciled carriers that already had operating authority when Congress's 1982 moratorium was imposed, (2) U S -owned but Mexico-domiciled private carriers and certain

for-hire commodity carriers, and (3) Mexico-domiciled carriers traversing the United States to deliver or pick up goods in Canada See 67 Fed Reg 12,702 (Mar 19, 2002) More importantly, since 1982, Mexico-domiciled carriers have logged millions of miles in the border commercial zones See 72 Fed Reg at 46,264 (noting that such carriers' vehicles make approximately 4 5 million trips in those zones annually) Evidence collected from these carriers confirms that Mexico-domiciled commercial vehicles and their drivers are placed out of service by State inspectors for regulatory violations less often than their U S -domiciled counterparts See supra at 10 DOT therefore had a sound basis for determining that the differences between the U S and Mexican regulatory regimes are of little practical significance, and that opening U S highways to additional Mexico-domiciled carriers would not diminish highway safety Substantial deference is owed to DOT's expert empirical judgment that the Demonstration Project is well-designed to "achieve a level of safety that is equivalent to or greater than, the level of safety that would otherwise be achieved " 49 U S C 31315(c)(2)

On these grounds alone DOT properly concluded that the statutory preconditions for initiating the Demonstration Project had been satisfied In any event, FMCSA has fully explained why the regulatory regime that applies to Mexico-domiciled carriers

participating in the Demonstration Project is the equivalent for safety purposes to the regime covering U S -domiciled carriers Moreover, the Project meets all other requirements that Congress imposed on opening the border to long-haul carriers from Mexico [12]

A The Project Meets The Equivalence Standard

The 2007 Act requires the Secretary of Transportation to "list" and "analy[ze]" all the "laws and regulations," including CDL requirements "for which the Secretary * * * will accept compliance with a corresponding Mexican law or regulation as the equivalent to compliance with the United States law or regulation " 2007 Act, §6901(b)(2)(B)(v) To the extent that Mexican and U S regulations diverge DOT has done precisely that

1 Licensing

Petitioners contend that DOT violated the 2007 Act because it did not adequately explain why Mexican CDLs were "equivalent"

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[12]By showing, as we do below that the Demonstration Project satisfies the standard of equivalent safety protection imposed by §31315(c), we dispose of OOIDA's contention (see OOIDA Br 27-19) that the Project violates 49 U S C 13902(a) That latter provision directs the Secretary to grant operating authority to motor carriers that comply with all applicable safety regulations and, according to OOIDA, also (by negative implication) prohibits grants of authority to carriers that do not But by expressly providing for pilot programs in 49 U S C 31315(c) Congress clearly contemplated that carriers participating in a test meeting the conditions of §31315(c) would lawfully be granted operating authority under §13902(a) In any event as we have shown the Demonstration Project neither relaxes U S regulations for participants nor accepts any Mexican regulations as equivalent that were not already deemed equivalent

to U S licenses for purposes of the Demonstration Project Sierra Club Br 24-29, OOIDA Br 39-44 Sierra Club further insists that this failure to explain deprived it of an opportunity to comment on the CDL equivalence analysis Sierra Club Br 49-53 These arguments are mistaken

In its June 8, 2007 notice, see 72 Fed Reg 31 884-85 DOT provided a chart setting forth the differences between the two countries' CDL rules thus making the very comparison that petitioners now demand 72 Fed Reg at 31,885 [13] In that same notice, DOT reiterated that it would continue to "accept" Mexican CDL requirements "as being equivalent" with U S requirements just as the agency has done since 1991 Id at 31 884, see also 72 Fed Reg at 46 276

Petitioners suggest that DOT's equivalence determination is flawed because Mexican licensing requirements differ from U S requirements See e g Sierra Club's Br 24 But "equivalen[ce]" does not and cannot require an identity between Mexican and U S CDLs Congress could have required Mexican truckers to secure U S CDLs before driving on U S roads Instead, understanding that some Mexican licensing requirements differ from U S requirements Congress gave the Secretary the

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[13]The table lists specific requirements for obtaining a Mexican CDL For U S CDLs, it identifies the location in the Code of Federal Regulations where the relevant requirements can be found Id

authority to make an equivalence determination based on an assessment of the relative similarities of the complex and technical licensing regimes See 2007 Act, §6901(b)(2)(B)(v), 49 U S C 31315(c)

For that reason, the D C Circuit has rejected the argument that equivalence requires identity In 1991, then-Secretary of Transportation Samuel Skinner, acting on behalf of the United States signed a Memorandum of Understanding ("MOU") with his Mexican counterpart in which both countries committed to recognizing CDLs issued by the other country See 57 Fed Reg at 31,454 (final rule implementing, and appending the MOU) The Teamsters challenged the MOU arguing that DOT acted arbitrarily in finding that Mexican CDLs were not "in accordance with or similar to" U S licensing standards The D C Circuit disagreed, explaining that "[t]here being no statutory requirement that the minimum federal standards be identical without regard to nationality, there is at most an implicit requirement that standards for foreign nationals be in substance 'similar to' those for U S nationals " Int'l Bhd of Teamsters, 17 F 3d at 1484 The court then found that the Secretary's equivalence determination was neither arbitrary nor capricious Id at 1486-86

Petitioners maintain that the 1991 equivalence determination does not control because Congress, in 1999, required DOT to

"disqualify from operating a commercial vehicle" drivers convicted of certain serious offenses while operating their private vehicles See 49 U S C 31310(g) Identifying a difference between the two licensing standards is a far cry, however, from demonstrating that the Secretary's equivalence determination is arbitrary and capricious Petitioners offer not an iota of evidence suggesting that the difference has practical significance DOT has wide discretion to determine whether the licensing standards are equivalent, see Int'l Bhd of Teamsters v Pena 17 F 3d 1478, 1484 (D C Cir 1994), and its equivalence determination is entitled to deference

Moreover, the 1999 disqualification provision does not address the MOU, let alone evince Congress' intent to "supersede" that agreement See Sierra Club Br 26 As the Supreme Court has emphasized "[i]t has been a maxim of statutory construction since the decision in Murray v The Charming Betsy [6 U S (2 Cranch)] 64, 118 (1804), that 'an act of congress ought never to be construed to violate the law of nations if any other possible construction remains * * * '" Weinberger v Rossi, 456 U S 25 32 (1982) The 1999 disqualification provision is perfectly compatible with the 1991 MOU, and it should not be read to violate a longstanding bilateral agreement of vital importance

to both Mexico and the United States [14] See George E Warren Corp v EPA 159 F 3d 616, 624 (D C Cir 1998) (deferring to an EPA interpretation adopted in part in an effort to comport with international law)

Sierra Club's claim that it was somehow caught by surprise by the Secretary's equivalence determination, or otherwise deprived of an adequate opportunity to comment on it (Sierra Club Br 49-53) is difficult to fathom Petitioners were on notice that DOT considered the Mexican and U S licensing regimes to be equivalent -- that determination after all has been embodied in a regulation for years and was upheld by the D C Circuit -- and that the equivalence determination was to remain in place for the Demonstration Project Indeed the Sierra Club petitioners offered comments contesting that very equivalence determination, and the agency responded See ER 79, 116, 72 Fed Reg at 46,275-76 The ventilation of the CDL issue in the rulemaking record demonstrates that FMCSA provided adequate notice on this issue

2 Training

Sierra Club argues that U S requirements for training of entry-level drivers have no counterpart in Mexican law and that this discrepancy "further undermine[s]" FMCSA's equivalence

[14]Indeed, the logic of petitioners' position would appear to preclude any Mexican, or Canadian, driver with a CDL issued by his own country from operating inside the United States

determination Sierra Club Br 29-31 (citing 49 C F R 380 501 & 380 503)

The regulations on which Sierra Club relies, however, entail a total of approximately 10 5 hours of training, none of it "hav[ing] anything to do with operational skills" of driving heavy trucks Advocates For Highway & Auto Safety v FMCSA, 429 F 3d 1136, 1143, 1145 (D C Cir 2005) For this reason and because it concluded that the final rule promulgating the regulations had "little apparent connection to the [training] inadequacies it purport[ed] to address," the D C Circuit remanded the rule to FMCSA Id at 1151-52 Although the court declined to vacate the regulations while FMCSA reconsiders how best to implement an effective training regime for commercial vehicle drivers the decision in Advocates For Highway & Auto Safety thoroughly undercuts Sierra Club's contention that the absence of counterpart requirements in Mexican law means that the Demonstration Project fails to meet the statutory standard of equivalent safety protection

3 Hours of Service

To bolster its safety-related allegations Sierra Club asserts that "the pilot program would permit a Mexico-domiciled driver to drive 10 hours in Mexico before arriving at the U S - Mexico border and then drive another 11 hours inside the U S even though U S regulations prohibit a commercial driver from

operating a vehicle for more than 11 hours at a time " Sierra Club Br 31-32 Sierra Club is, again, mistaken

DOT regulations require any commercial driver on U S roads, whether working for a Mexico-domiciled carrier or a U S carrier, to make and retain a record of his driving activities covering the previous seven days, including hours of operation See 49 C F R 395 8(a) & (k)(2) see also id at §395 8(e) (explaining that failure to comply with record-keeping requirements makes the driver and the carrier subject to prosecution) Those requirements have not been waived for Mexico-domiciled carriers While Sierra Club is correct that a Mexico-domiciled driver does not have to comply with U S requirements while driving in Mexico -- DOT obviously cannot enforce domestic regulations in a foreign country (see 72 Fed Reg at 46,280) -- a Mexico-domiciled driver would nevertheless be in violation of DOT regulations if he attempted to drive on U S roads without a record of his previous seven days' activities whether those activities occurred in Mexico or elsewhere [15] And U S safety inspectors at the border and elsewhere in the United States inspect Mexican driver logbooks

[15] See Hours of Service Rule Frequently Asked Questions available at http //www fmcsa dot gov/documents/rulesregs/hos/hos-faqs pdf at 8-9 (explaining that for Mexican and Canadian drivers, "compliance with the HOS regulations is checked by looking backward in time, and activity occurring outside the U S may be taken into account")

and other relevant documentation to verify hours-of-service compliance See 72 Fed Reg at 46,281

To be in compliance with federal law, then, Sierra Club's hypothetical driver would have been obligated to log and retain a record of his ten-hour driving stint in Mexico If he drove for more than another consecutive hour in the U S , he would violate the hours-of-service regulations in precisely the same way that a driver for a U S carrier would violate those regulations

4 Medical Eligibility

Sierra Club claims without elaboration that "FMCSA identifies the existence of differences in the medical and physical fitness standards for commercial drivers in the U S and Mexico but fails to explain what those differences are " citing for support the published table comparing and contrasting commercial vehicle regulations in the U S and Mexico Sierra Club Br 32 (citing 72 Fed Reg at 31,885) Contrary to Sierra Club's allegation the table does not identify any such differences The only portion of the referenced table dealing with "[m]edical [s]tandards" states that both the U S and Mexico "[r]equir[e] a comprehensive physical and psychological examination" regulation 72 Fed Reg at 31,885 [16] Sierra Club

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[16]The table does note that (1) in the U S , the medical examination is a freestanding regulatory requirement whereas in Mexico such an examination "is a pre-requisite to obtaining" a Mexican CDL and (2) in Mexico, a physical "may be required" (continued)

has therefore identified no differences in the two regulatory regimes for the agency to explain away

Like Sierra Club, OOIDA does not point to any differences between medical qualification requirements in the two countries It attempts to sharpen Sierra Club's critique by claiming that the agency has offered an insufficiently detailed analysis of what differences might exist between U S and Mexican medical fitness standards OOIDA Br 45-46 But DOT did describe what it viewed as the critical diverging features of the Mexican and U S medical standards See 72 Fed Reg at 31 885 & 46 285 The congressional mandate that the Secretary analyze the differences between the U S and Mexican regulatory regimes does not obligate the agency to document its analysis with the kind of punctiliousness OOIDA apparently desires [17] And OOIDA's inability

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[16] (continued)
while the operator is on duty Id If anything the Mexican regulations offer greater assurances of driver safety than their U S counterparts and they certainly do not call into question the overall safety of the Demonstration Project

[17] OOIDA attempts, for example, to require FMCSA to publish "at a minimum * * * an English translation of the Mexican medical qualification requirements " OOIDA Br 45-46 No statute directs DOT to offer its services as a translator OOIDA also asserts that FMCSA has disclosed nothing about the availability of waivers from medical standards under the Mexican regulatory regime Id at 45 That FMCSA did not discuss in published notices every possible point of comparison between the Mexican and U S regulations does not undermine the agency's equivalence determination FMCSA understands that Mexico does not waive its driver medical standards -- Mexican CDL applicants who fail their medical examinations do not qualify for a CDL In any event, the
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to point to even one meaningful distinction underscores that rehearsing arcane distinctions in medical fitness regulations would have been pointless

Moreover, and significantly, DOT has emphasized that "Mexican-domiciled motor carriers have been operating within commercial zones for years with the medical certification provided as part of the [Mexican licensing process], and the Agency is not aware of any safety problems that have arisen as a result " 72 Fed Reg at 46,285 [18] Based on this experience DOT reasonably concluded that there was "no reason to revise its previous judgment that the medical standards [in the two countries] are comparable " Id

5 Drug Testing

Both Sierra Club and OOIDA complain that FMCSA does not offer a sufficiently detailed comparison of the differences between Mexican and U S requirements for drug and alcohol testing Sierra Club Br 32-33 OOIDA Br 46-50 The agency's

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[17](continued)
agency's acceptance of Mexican CDLs is factored into "the level of safety that would otherwise be achieved through compliance with [existing U S] regulations " 49 U S C 31315(c)(2)

[18]As already noted, Mexican drivers (with Mexican CDLs) cross into the United States approximately 4 5 million times annually to reach destinations in the border commercial zones See 72 Fed Reg at 46,264 Moreover, drivers for Mexican carriers that were already operating in this country in 1982 (when the moratorium on issuance of new operating authority for Mexican carriers was imposed) have always been free to operate with Mexican commercial licenses throughout the United States

conclusion that the testing regimes of the two countries are equivalent is belied, according to OOIDA, by statements in published notices that Mexico does not have any facilities certified to collect samples for drug testing

These arguments are at odds with the content of a Memorandum of Understanding between the U S and Mexico See Respondents' Supplemental Excerpts of Record ("Supp ER") at 1-12 The MOU provides for both countries to use the same substantive standards for drug and alcohol testing (see Supp ER at 2) for testing in the same circumstances and with the same frequency (see id at 2-3, see also 49 C F R pt 382 subpt C), and for use of the same procedures to conduct the tests (see Supp ER at 3-4) Those procedures are set forth in an annex to the MOU, which also (and critically) makes clear that, until Mexican testing laboratories actually achieve "a level of equivalency with U S laboratory certification standards " all testing for detection of drug use by Mexican operators of commercial motor vehicles is to be done "by laboratories certified by [the U S Department of Health and Human Services] or by laboratories which are deemed equivalent to U S laboratory certification standards by DOT " Id at 8

Contrary to OOIDA's suggestion (OOIDA Br 48), FMCSA has never required U S facilities that collect samples for drug testing to be certified Thus the absence of certified

collection facilities in Mexico does not undermine the agency's determination that an equivalent level of safety would be achieved by compliance with Mexican regulations in this area [19]

Sierra Club suggests that DOT has weakened the general requirement that drivers of commercial vehicles submit to random drug tests see 49 C F R 382 305 by declining to require testing of drivers for Mexico-domiciled carriers inside Mexico and by selecting them for testing only when they cross the border into the U S Sierra Club Br 32-33 DOT lacks the authority to force drivers in Mexico to submit to drug tests but DOT will subject those drivers to random drug tests when they are in this country in the same circumstances and at the same rate that drivers for U S -domiciled carriers are tested [20]

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[19]OOIDA's apparent understanding that U S collection facilities are certified may stem from an error in FMCSA's August 17 2007 notice which stated that "there presently are no U S certified collection facilities and laboratories in Mexico" and that Mexican carriers would therefore be required to comply with testing requirements "by using collection facilities and certified laboratories in the United States " See 72 Fed Reg at 46,282 (emphasis added) This statement should have been limited to "certified laboratories " The MOU is clear that the U S certification standards apply only to testing laboratories, and not to collection facilities See Supp ER 8 Moreover DOT's drug and alcohol regulations pertaining to collection facilities do not include a certification requirement See 49 C F R pt 40 subpt D

[20]FMCSA anticipates that as a practical matter this will be accomplished in the same way that drivers for Mexico-domiciled carriers currently operating in the commercial zones are tested These carriers join consortia formed by smaller U S carriers that collectively contract for drug testing services Drivers (continued)

B The Project Includes Sufficient Participants

Congress has required the Demonstration Project to comply with the pilot program provision 2007 Act, §6901(a)(2) Under that provision, the Project must include "[a] reasonable number of participants necessary to yield statistically valid findings " 49 U S C 31315(c)(2)(C)

Sierra Club maintains that the size and duration of the Demonstration Project -- 100 carriers and one year -- are inadequate to satisfy this requirement This is demonstrably incorrect In its most recent response to public comments, the agency explained that 100 carriers represented approximately ten percent "of the motor carriers that had submitted applications for operating authority prior to the announcement of the Agency's plans to conduct the demonstration project " 72 Fed Reg at 46,271 In other words, the Project is designed to include up to ten percent of all of the Mexican carriers that have expressed concrete interest in access to U S delivery destinations beyond the border commercial zones

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[20](continued)
for these carriers are randomly selected for drug tests as they operate throughout the United States, and they are then required either to report promptly for testing at nearby collection facilities included in the consortium's program or to submit to testing (without advance notice) when they return to the carrier's home terminal Further FMCSA understands that drivers for Mexico-domiciled carriers participating in these consortia are subject to random testing while in Mexico, which is accomplished at Mexican government testing facilities or the nearest designated U S facility

This size should be more than adequate to allow FMCSA to generate a statistically valid snapshot of the safety of Mexican operators as a whole Petitioners have made no showing whatsoever to the contrary Indeed had the agency chosen to allow a significantly larger fraction of Mexican carriers to participate in the Demonstration Project, it would have risked effectively opening the border to Mexico-domiciled carriers, thereby contravening Congress' mandate that it make a test run before beginning a larger program 2007 Act, §6901(b)(2)

FMCSA expects 100 carriers eventually to participate in the Demonstration Project, but, inasmuch as participation is voluntary and not completely under the agency's control the agency has forthrightly acknowledged that the number of carriers that will ultimately take part in the program might not reach the target level 72 Fed Reg at 46,271 Likewise the agency cannot predict with certainty the number and length of trips that participating carriers will make, although in its expert judgment the Mexico-domiciled carriers will travel more than enough miles to generate a statistically valid sample But because pilot programs are designed in part to test assumptions this residual uncertainty is perfectly consistent with the Demonstration Project Indeed, Congress anticipated this kind of uncertainty by requiring the Inspector General to make both an interim report six months after the program starts and a final report when it is

over 2007 Act, §6901(c) Those reports will assess whether as FMCSA fully expects, the Demonstration Project ultimately "consist[ed] of a representative and adequate sample of Mexico-domiciled carriers likely to engage in cross-border operations beyond [the border commercial zones] " Id at §6901(c)(3)

Finally the agency's decision to set a one-year time limit on the Demonstration Project does not undermine its validity as a predictor of whether those Mexico-domiciled trucks can operate safely in the United States As FMCSA explained, it was under no statutory obligation to extend the project to the three-year maximum permitted under the pilot program provision See 49 U S C 31315(c)(2)(A) It was entirely reasonable for the agency to conclude that a one-year Demonstration Project with phased-in participation was sufficient to evaluate whether Mexican carriers could operate as safely as their American counterparts See Gifford Pinchot Task Force v Fish & Wildlife Serv , 378 F 3d 1059, 1066 (9th Cir 2004) ("An agency's scientific methodology is owed substantial deference ")

Even more importantly if participation rates are low DOT retains the discretion to extend the Demonstration Project up to the three-year maximum permitted by statute DOT thus has the ability to rectify any unanticipated shortfall in participation

that might affect the viability of the Demonstration Project as a measure of the safety of Mexico-domiciled carriers

C Reciprocal Access To Mexico For U S Carriers Is Available

The 2007 Act permits the Secretary to grant authority to Mexican carriers to operate in this country outside the border zones only if "simultaneous and comparable authority * * * is made available" by Mexico to U S carriers 2007 Act, §6901(a)(3) Record evidence of Mexico's commitment to do precisely that refutes Sierra Club's contention that this requirement remains unsatisfied

A "Memorandum of Consultations" signed by Secretary of Transportation Mary E Peters and her Mexican counterpart, Luis Tellez Kuenzler, the Secretary of Mexico's Ministry of Communications and Transport, specifies the mutual commitments of the United States and Mexico to make the Demonstration Project fully reciprocal ER 81-84 That document states that, after the project begins "with the issuance of up to 25 permits " the two countries "intend to issue up to 25 permits each per month, until either 100 permits per country are issued or all interested participating companies that fully comply with the requirements have received permits for operating authority " ER 81

With the written commitment of Mexico's top transportation official to allow U S carriers to operate there on a reciprocal basis such authority is "made available" to U S carriers within

the meaning of the 2007 Act See Vimar Seguros y Reaseguros, S A v M/V Sky Reefer 515 U S 528, 539 (1995) ("If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements ")

Sierra Club asserts that the Memorandum of Consultations does not satisfy the reciprocity requirement because it does not spell out "the conditions under which U S -domiciled motor carriers would be granted authority -- such as what inspections would be required or what other requirements could be imposed by the Mexican government " Sierra Club Br 42-43 Surely however in requiring that Mexico "ma[k]e available" to U S carriers "simultaneous and comparable authority" to operate within its borders, Congress did not contemplate subjecting Mexico to the same extensive preconditions required of DOT before the Demonstration Project could begin

D The Agency Has Published All Required Information Regarding Pre-Authorization Safety Audits

Sierra Club maintains that FMCSA has failed to publish inspection audit data in accordance with the 2007 Act The statute requires the Secretary to publish and provide notice and opportunity for comment regarding inspection information of "motor carriers domiciled in Mexico that are granted authority to

operate beyond the United States municipalities and commercial zones on the United States-Mexico border " 2007 Act, §6901(b)(2)(B)(i) (emphasis added)

FMCSA has published safety audit information for each and every Mexican carrier currently authorized to participate in the Demonstration Project See 72 Fed Reg at 31 886-94 (listing PASA information for individual Mexican carriers) And additional carriers will begin participating only after their PASA information has similarly been published [21] Nothing more is required The statute by its terms provides for the publication of PASA information before initiation of the Demonstration Project only for carriers that "are granted authority " not for those that will be granted authority at some future time Even if the statutory language were ambiguous FMCSA has explained that "[t]he statute is satisfied if prior to the program's initiation such notice and opportunity for comment is provided with respect to PASAs for all carriers that will initially participate " 72 Fed Reg at 46 272-73 [22] That construction is

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[21]The agency recently published information on 15 additional Mexico-domiciled carriers that have successfully completed their safety audits 72 Fed Reg 58 929 58 930 & 58 933-36 (Oct 17 2007)

[22]Sierra Club argues that the 2007 Act "identifies the 'initiation of the pilot program' as an event that takes place after operating authority is granted to Mexico-domiciled carriers, and after data and information regarding the inspections is published " Sierra Club Br at 46 But Sierra (continued)

eminently reasonable and is entitled to deference See Chevron U S A Inc , 467 U S at 843

Sierra Club nonetheless insists that the statute must be interpreted in a manner at odds with its text because the provision "is designed to ensure that the public and Congress have full information about all participating carriers before the pilot program commences " Sierra Club Br 48 According to Sierra Club, the public and Congress require such blanket notice in order to afford them an opportunity to comment on the possibility that carriers from one region of Mexico might be over-represented in the Demonstration Project which in turn might skew the project's results Id

But Sierra Club cites no support in the language or history of the statute for that contention To the contrary, as the agency has properly recognized, the statute was intended to provide the public with an opportunity to voice any concerns it has about the safety of a Mexican carrier before that carrier is

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[22] (continued)
Club's emphasis has no footing in the statutory text Stripped of amplifying phrases unrelated to the timing of FMCSA's notice and comment obligation, the statute provides "Prior to initiation of the pilot program * * * the Secretary of Transportation shall * * * publish * * * comprehensive data and information on the [PASAs] * * * of motor carriers domiciled in Mexico that are granted authority to operate [outside the border zones] " 2007 Act, §6901(b) This directive simply is not an express requirement that the agency publish PASA information on all project participants before any can begin cross-border operations

allowed to enter the United States and operate beyond the border zones That policy is entirely vindicated if FMCSA publishes safety audit results for Mexican carriers and provides an opportunity for comment before approving their participation in the Demonstration Project as DOT has done and intends to continue doing [23]

Sierra Club is also wrong that the public has no way of knowing which carriers among those for whom PASA information has been published, have actually received grants of authority to begin operations under the Project See Sierra Club Br 48 n 13 FMCSA posts on its website the name of every carrier granted such authority See http //www fmcsa dot gov/cross-border/cross-border-carriers htm

Permitting FMCSA to approve Mexican carriers in phases is consistent with the 2007 Act and this approach will allow the agency to roll out the Demonstration Project gradually thereby ensuring that any programmatic difficulties can be quickly identified and corrected

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[23]Members of the public wishing to oppose a grant of operating authority to a particular carrier in fact have two opportunities to make their views known to the agency They can protest such a grant of authority within ten days of FMCSA's announcement of the carrier's application in its online register See 49 C F R pt 365 subpt B They can also do so after the agency publishes the carrier's PASA results for comment

E The Agency Has Adequately Addressed The Inspector General's Findings

Before starting the Demonstration Project, section 350(a)(6) obligates DOT to "requir[e] State inspectors who detect violations of Federal motor carrier safety laws or regulations to enforce them or notify Federal authorities of such violations "

Sierra Club points to a finding in the Inspector General's September 6 2007 report that "five [State] officials stated that they were not ready to enforce" safety rules during the Demonstration Project ER 48, see Sierra Club Br 39 As FMCSA has explained time and again, however drivers from Mexico-domiciled carriers operating in this country under the Demonstration Project are held to the same safety standards as drivers from U S - and Canada-domiciled carriers See, e g 72 Fed Reg at 46,277 And States have proven effective at enforcing federal motor carriers regulations in the past States perform approximately three million roadside inspections of commercial vehicles annually and the results of these inspections are uploaded to FMCSA computers where they can be monitored See e g 72 Fed Reg at 46 266 FMCSA has indicated that it will continue to use this routine procedure to meet its obligation under section 350(a)(6) Id Sierra Club has offered no reason to think that State enforcement will be ineffective or

that FMCSA will not be informed of regulatory violations by Mexico-domiciled trucks [24]

Moreover FMCSA has worked to address any minor deficiencies identified in the Inspector General's report Each FMCSA Division Administrator has met with State partners to discuss the Demonstration Project, FMCSA has held briefings for officials from commercial vehicle law enforcement agencies, and FMCSA has widely distributed law enforcement outreach materials ER 62-63 It would be senseless to halt the Demonstration Project to give FMCSA an opportunity to do what it has already done to rectify any perceived deficiencies in State enforcement efforts See 5 U S C 706 (requiring reviewing courts to take "due account" of "prejudicial error")

Sierra Club also makes much of the finding that "officials in seven states said they did not have procedures in place for enforcing restrictions on point-to-point deliveries" -- that is trips that both start and end inside this country ER 49 see Sierra Club Br 39 Section 350(a)(6) however, only directs the Secretary to require state officials to enforce "Federal motor carrier safety laws or regulations " The restriction on point-to-point deliveries is in no way a "safety" rule but rather an

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[24]Although FMCSA anticipates that States will both enforce all applicable safety regulations and notify the agency of violations the text of section 350(a)(6) refers to these actions in the alternative

economic regulation that implements a NAFTA provision allowing the U S to reserve point-to-point transportation to U S carriers See 72 Fed Reg at 46,286 ("Mexico-domiciled motor carriers cannot compete against U S -domiciled carriers for point-to-point deliveries of domestic freight cabotage within the United States "), see also 8 C F R 214 2(b)(4)(i)(E)(1) (prohibiting the entry into the country of Mexican or Canadian shippers that engage in "[p]urely domestic service or solicitation, in competition with the United States operators" (emphasis added)) Thus, enforcement of this regulatory restriction is outside the scope of section 350(a)(6)

Finally, Sierra Club argues that the 2007 Act conditions the start of the Demonstration Project on FMCSA compliance with all provisions in section 350 even those unrelated to the Demonstration Project According to Sierra Club FMCSA has not fully addressed two such compliance issues identified by the IG (1) providing sufficient inspection capacity for passenger buses entering the U S from Mexico at a single location during high volume holiday periods, and (2) amending the 2002 PASA regulations to include (in the provision identifying the specific safety regulations with which Mexico-domiciled carriers must comply) a reference to subsequently promulgated provisions concerning a type of truck not participating in the Demonstration Project See Sierra Club Br 43-45 Neither of these IG

findings, which Sierra Club acknowledges are "not directly related" to the Demonstration Project (id at 45), provides a basis for halting the Project

With respect to FMCSA's capacity to inspect passenger buses, the IG identified one location where this problem existed, and even there capacity was insufficient only "during high volume holiday periods " ER 36 The IG report indicated that, as a result of FMCSA's earlier implementation of a plan to expand inspection capacity for buses this was the sole location where even a temporary shortfall remained Id Most importantly, the IG reported FMCSA's plan to complete an expansion of bus inspection capacity at that location by December 31 2007, six weeks after filing of this brief ER 37 This compliance issue -- which concerns only buses, and not trucks[25] -- will thus be moot well before oral argument in this case occurs under the expedited schedule set by the Court See Kasra v Browner 133 F 3d 1159, 1172 (9th Cir 1998) (where agency's alleged statutory non-compliance has ceased and record does not suggest it will recur, "nothing is left for effective relief" and "[t]he case is over") Moreover §6901(d) of the 2007 Act requires FMCSA to initiate a separate pilot program before granting long-

[25]Buses often enter the U S at crossings that are unavailable to trucks, and the single crossing where the IG found insufficient capacity at holiday periods is not a truck crossing See ER 35-36

haul authority to Mexico-domiciled buses In connection with such a program, the IG would again have to verify the agency's compliance with section 350(a) This requirement would ensure that FMCSA's ability to inspect buses would be measured at the time it is actually relevant

As to the second of these compliance issues, Sierra Club points to the IG's finding that FMCSA had not updated its PASA regulations (49 C F R 365 507 & subpt E app A) to provide explicitly that safety audits of Mexico-domiciled carriers will include review of the carrier's compliance with 49 C F R Part 380 See ER 51 Part 380, which was promulgated in 2004 (two years after the PASA regulations) concerns requirements for operators of "longer combination vehicles" or "LCVs " See 49 C F R 380 101 LCVs are excluded from participation in the Demonstration Project See ER 56 In any event the IG "confirmed" that the PASA process "emphasizes that the applicant must comply with all safety rules" and "includes a requirement for certification by Mexican carriers that they understand and will comply with all current [safety regulations and standards] " ER 51 Accordingly, the IG found that the failure to list Part 380 in the PASA regulations did not result in "any impact on the operation of the safety program " Id

III THE DEMONSTRATION PROJECT IS CONSISTENT WITH ALL GENERALLY APPLICABLE SAFETY STATUTES

Petitioners argue that the Demonstration Project must be enjoined because it fails to comply with several statutory provisions not specifically directed at cross-border trucking that nevertheless limit the Secretary's authority The Project is consistent with all of these provisions

A Participating Vehicles Are Not Required To Be Certified Under 49 U S C 30112 and 30115

Sierra Club accurately notes that, under the Vehicle Safety Act manufacturers and distributors of motor vehicles must affix a permanent label to any "import[ed]" vehicle certifying that it complies with Federal Motor Vehicle Safety Standards ("FMVSS") 49 U S C 30115(a), see also id at §30112 (discussed at Sierra Club Br 33-38) The FMVSSs, promulgated by a DOT component the National Highway Traffic and Safety Administration ("NHTSA"), are performance standards for motor vehicles that must be met by vehicle manufacturers (e g , windshield wiper speeds) See generally 49 U S C ch 301

In August 2005 -- more than two years ago -- FMCSA and NHTSA issued concurrent Federal Register notices withdrawing proposed rules addressing the scope of the certification requirement and the manner in which it would be enforced See 70 Fed Reg 50,269 (Aug 26, 2005) 70 Fed Reg 50 277 (Aug 26 2005) Those notices announced the enforcement policy that DOT had

decided to adopt Id Critically, the two agencies declined to require all commercial motor vehicles entering the country for the purposes of engaging in cross-border trade, whether from Canada or Mexico to have a certification label

FMCSA acknowledged that while "the presence or absence of an FMVSS compliance label can certainly provide a useful tool" in ensuring the safety of a motor vehicle the agency would also permit trucks from foreign-domiciled carriers to operate across the border when "alternative identification methods" are available for assuring compliance 70 Fed Reg at 50 274 As Sierra Club notes one of those alternative methods is inspecting vehicle identification (VIN) numbers Id Additionally vehicles from Mexico-domiciled carriers will be subject to inspection during the PASAs and while operating in the United States to ensure their compliance with applicable motor carrier regulations including those that cross-reference FMVSSs Id

Sierra Club maintains that trucks from Mexico-domiciled carriers are "imports" within the meaning of the Vehicle Safety Act and are therefore required to bear certification labels in every instance Sierra Club's Br 34 From this it draws the conclusions that DOT's enforcement policy is unlawful, and that the Demonstration Project is therefore invalid Id at 35 Although Sierra Club presents this claim as a challenge to the Demonstration Project, DOT's position on when certification

labels will be required is part of a broader DOT enforcement policy adopted in 2005 to ensure conformity with federal motor carrier regulations See 70 Fed Reg 50 269 & 50 277 Totally outside the context of the Demonstration Project, that policy applies to Canada-domiciled carriers operating throughout the U S and to Mexico-domiciled carriers operating in the border zones

Sierra Club's challenge to that 2005 policy is untimely The Hobbs Act which Sierra Club has here invoked as the basis for this Court's jurisdiction, see Sierra Club Br 2, requires suit to be brought "within 60 days" of the entry of a final agency order, see 28 U S C 2344 Sierra Club cannot attack a two-year-old enforcement policy through a petition for review that challenges a single pilot program See ICC v Bhd of Locomotive Engineers, 482 U S 270, 281 (1987) (finding "implicit in the 60-day limit upon judicial review a prohibition against the agency's permitting or a litigant's achieving perpetual availability of review by the mere device of filing a suggestion that the agency has made a mistake and should consider the matter again")

In any event DOT has reasonably concluded that the Vehicle Safety Act does not obligate trucks engaging in cross-border trade to bear a certification label Sierra Club claims without analysis, that a truck that temporarily enters this country to

engage in cross-border trade has been "import[ed]" within the meaning of §30112 and that §30115 therefore requires certification See Sierra Club Br 34 n 9 As noted above although NHTSA did adopt that interpretation in a 1975 letter the agency withdrew the letter in the 2005 notice, finding that "the term 'import' is subject to various interpretations, of which the agency's 1975 interpretation is but one " 70 Fed Reg at 50,284

In its 2005 notice, NHTSA recognized that Congress had not defined "import" in the Vehicle Safety Act NHTSA carefully reasoned that courts have given "import" different meanings in different contexts which indicated that the word "should be construed in such a way as to further the goals that Congress was seeking to achieve when enacting the law " Id at 50285 For the purpose of ascertaining congressional intent, NHTSA found it relevant that an expansive interpretation of "import" was at odds both with customs regulations existing at the time of the Vehicle Safety Act's enactment and with the longstanding practice of permitting Canada-domiciled carriers to enter the country without inspection Id at 50 285-87

Furthermore, NHTSA explained that a narrower interpretation of "import" would have no safety consequences The agency observed that "the vast majority of Mexican-domiciled vehicles engaged in U S long-haul traffic either carry the label or were

originally built to then applicable U S [FMVSS] standards " Id at 50,284 In part because of that, the agency made the expert judgment that assuring compliance with the Federal Motor Carrier Safety Regulations (FMCSRs) would better protect the American public than enforcing an inflexible requirement that a certification label be affixed to each truck Id at 50287 As FMCSA explained in 2005, the FMCSRs incorporate most of the FMVSSs and "Congress intended the FMVSSs and the FMCSRs as mutually supportive systems of regulations -- one manufacturing, the other operational " 70 Fed Reg at 50,271 [26] For these reasons, NHTSA concluded that the 1975 interpretation "does not adequately reflect the current regulatory environment and, in light of FMCSA's program to ensure operational safety, would provide no additional safety benefit " Id at 50 287

Trucks that temporarily enter this country to facilitate cross-border trade but which are not themselves introduced as objects of commerce have not been "imported" within the meaning of the Vehicle Safety Act This comports with the ordinary

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[26]Sierra Club mischaracterizes the agency's position when it claims that FMCSA "suggest[ed]" in 2005 that the model year of trucks is "a reasonable proxy for a certificate of compliance " Sierra Club Br 37 DOT does not believe that the model year of trucks can substitute for a certificate of compliance as explained DOT believes that the Vehicle Safety Act does not require trucks engaged in cross-border trade to bear a certification label Rather, the model year of Mexico-domiciled trucks provides a mechanism for enforcing FMCSRs which in turn incorporate many of the FMVSSs See 70 Fed Reg at 50 270

meaning of "import," which bespeaks the "bring[ing] (as wares or merchandise) into a place or country from another country " See Webster's Third New International Dictionary 1135 (1993) In no ordinary sense are the trucks that bring imported goods across the border "wares or merchandise "[27] For such trucks, the certification requirement is therefore wholly inapplicable

B The Exemption Provision, 49 U S C 31315(b) Has No Application To The Project

In contending that FMCSA was required to comply with the procedures in 49 U S C 31315(b) which governs "exemptions" from regulatory requirements, OOIDA misapprehends the structure of section 31315 as a whole and the separate functions of its subsections OOIDA Br 29-37 Section 31315 of Title 49 is entitled "Waivers exemptions and pilot programs " and it provides three distinct mechanisms for departing from otherwise applicable federal motor carrier safety requirements These mechanisms are not overlapping, as is apparent in the text of the

[27]The same analysis applies to the statutory phrase "introduc[e] in interstate commerce " 49 U S C 30112 which in context is most naturally read to refer to the introduction of trucks into the stream of commerce as objects of that commerce not as facilitators of it Even more importantly, the term "interstate commerce" as used in 49 U S C 30112 does not include commerce between a foreign country and the U S See 49 U S C 30102(a) ("In this chapter -- * * * (4) "'interstate commerce' means commerce between a place in a State and a place in another State or between places in the same State through another State ")

provision itself and in DOT's procedural regulations implementing it

Each of the statutory mechanisms authorized by §31315 has a different time limit, and this is a strong textual indication that Congress intended the three subsections to operate separately "Waivers" are limited to three months or less 49 U S C 31315(a) "Exemptions," on the other hand, can be granted for as long as two years (id at §31315(b)) and "pilot programs" can last up to three years (id at §31315(c)) It is unlikely that Congress would have authorized DOT to design pilot programs to test regulatory alternatives over a three-year period if essential components of the programs had to be discontinued before the tests as a whole were completed

The fact that subsection (c) itself refers to "exemptions" does not undermine the practical conclusion that the statute establishes three mutually exclusive mechanisms Subsection (c) contains a requirement for notice and comment procedures and a substantive standard of equivalent safety protection -- features that parallel elements of subsection (b) Congress would have had no reason to include these features in subsection (c) if the analogous requirements in subsection (b) already applied to pilot programs [28] It is moreover sensible to craft different procedures

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[28] Kawaauhau v Geiger, 523 U S 57, 62 (1998) ("[W]e are hesitant to adopt an interpretation of a congressional enactment (continued)

for authorizing exemptions and pilot programs, which respectively have different functions An exemption provides a way for a regulated entity to obtain permission to depart from regulatory requirements, whereas a pilot program provides a mechanism for testing regulatory alternatives designed by DOT

This distinction is apparent in DOT's regulations implementing §31315 See 49 C F R pt 381 Under those regulations both waivers and exemptions are granted (albeit in different circumstances) in response to applications by individuals or classes of persons See 49 C F R 381 210 (entitled "How do I request a waiver?"), 49 C F R 381 310 (entitled "How do I apply for an exemption?") In contrast, the pilot program regulations which the 2007 Act expressly makes applicable to this Demonstration Project, describe a procedure initiated by DOT See 49 C F R 381 405

For all these reasons the exemption provisions in 49 U S C 31315(b) simply have no application to this Demonstration Project The agency's relevant notice and comment obligations are those in the pilot program provision 49 U S C 31315(c) and DOT has satisfied those procedural obligations OOIDA's assertion that "the record indicates no effort by FMCSA to do a 'thorough review' of the safety implications" of the

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[28] (continued)
which renders superfluous another portion of that same law ")
(internal quotation marks omitted)

Demonstration Project (OOIDA Br 36) is belied by the agency's numerous published notices, which do exactly that

In any event, as already noted, Demonstration Project participants must comply with all applicable DOT regulations DOT is not granting any exemptions from its regulations to Project participants To the extent that these regulations apply only to Mexican carriers and drivers, they are the same regulations that have applied inside and outside the border commercial zones for years They are part of the agency's overall regulatory regime and do not themselves constitute exemptions

C The Project Need Not Comply With The Physician Registry Scheme Mandated By 49 U S C 31149

OOIDA is equally mistaken that DOT has violated 49 U S C 31149 by announcing that it would accept physical examinations of Mexican drivers performed by Mexican physicians See OOIDA Br 50-53 Section 31149 directs DOT inter alia to create a national registry of medical examiners qualified to perform physical examinations of operators of commercial motor vehicles, and to require each such operator to have a valid medical certificate issued by an individual on that registry 49 U S C 31149(d) & 31149(c)(1)(B)

The provision, enacted in 2005 (see Pub L No 109-59, 119 Stat 1144 1726) empowers the Secretary of Transportation to issue regulations implementing the complex substantive

requirements of section 31149 (see 49 U S C 31149(e)) Section 31149 is not self-executing and does not itself impose obligations on carriers Although DOT is working to develop those regulations, they have not yet been published, even in proposed form Accordingly the registry contemplated by §31149 does not yet exist, and DOT does not yet enforce the provision's requirements on any U S carrier Despite its rhetoric (see, e g OOIDA Br 52-53) OOIDA is not here challenging the agency's failure to publish regulations implementing 49 U S C 31149 See OOIDA ER Tab 7 Without making and prevailing on, such a challenge, OOIDA cannot show that DOT has unlawfully failed to enforce §31149 (which again does not itself impose regulatory requirements on carriers) against participants in the Demonstration Project

In the 2007 Act which addressed in excruciating detail all of the numerous statutory provisions that established conditions for initiation of the Demonstration Project Congress did not require implementation of 49 U S C 31149 as a precondition of the Project nor should this Court

CONCLUSION

For the foregoing reasons, the petitions for review should be denied

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) Fed R App P I hereby certify that the foregoing brief complies with the type-volume limitation in Rule 32(a)(7)(B) The brief, which uses a monospaced type face with not more than 10 5 characters per inch, contains 13,645 words

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ADDENDUM

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Public Law No 110-28, § 6901, 121 Stat 112, 183 185 provides

U S TROOP READINESS VETERANS' CARE KATRINA RECOVERY AND IRAQ ACCOUNTABILITY

APPROPRIATIONS ACT 2007

May 25 2007

<< 49 USCA § 13902 note >>

SEC 6901 (a) Hereafter funds limited or appropriated for the Department of Transportation may be obligated or expended to grant authority to a Mexico domiciled motor carrier to operate beyond United States municipalities and commercial zones on the United States Mexico border only to the extent that

(1) granting such authority is first tested as part of a pilot program

(2) such pilot program complies with the requirements of section 350 of Public Law 107 87 and the requirements of section 31315(c) of title 49 United States Code, related to pilot programs and

(3) simultaneous and comparable authority to operate within Mexico is made available to motor carriers domiciled in the United States

(b) Prior to the initiation of the pilot program described in subsection (a) in any fiscal year

(1) the Inspector General of the Department of Transportation shall transmit to Congress and the Secretary of Transportation a report verifying compliance with each of the requirements of subsection (a) of section 350 of Public Law 107 87 including whether the Secretary of Transportation has established sufficient mechanisms to apply Federal motor carrier safety laws and regulations to motor carriers domiciled in Mexico that are granted authority to operate beyond the United States municipalities and commercial zones on the United States-Mexico border and to ensure compliance with such laws and regulations and

(2) the Secretary of Transportation shall

(A) take such action as may be necessary to address any issues raised in the report of the Inspector General under subsection (b)(1) and submit a report to Congress detailing such actions and

(B) publish in the Federal Register and provide sufficient opportunity for public notice and comment

(i) comprehensive data and information on the pre authorization safety audits conducted before and after the date of enactment of this Act of motor carriers domiciled in Mexico that are granted authority to operate beyond the United States municipalities and commercial zones on the United States Mexico border

(ii) specific measures to be required to protect the health and safety of the public including enforcement measures and penalties for noncompliance

(iii) specific measures to be required to ensure compliance with section 391 11(b)(2) and section 365 501(b) of title 49 Code of Federal Regulations

(iv) specific standards to be used to evaluate the pilot program and compare any change in the level of motor carrier safety as a result of the pilot program and

(v) a list of Federal motor carrier safety laws and regulations including the commercial drivers license requirements, for which the Secretary of Transportation will accept compliance with a corresponding Mexican law or regulation as the equivalent to compliance with the United States law or regulation including for each law or regulation an analysis as to how the corresponding United States and Mexican laws and regulations differ

(c) During and following the pilot program described in subsection (a) the Inspector General of the Department of Transportation shall monitor and review the conduct of the pilot program and submit to Congress and the Secretary of Transportation an interim report 6 months after the commencement of the pilot program and a final report within 60 days after the conclusion of the pilot program Such reports shall address whether

(1) the Secretary of Transportation has established sufficient mechanisms to determine whether the pilot program is having any adverse effects on motor carrier safety

(2) Federal and State monitoring and enforcement activities are sufficient to ensure that participants in the pilot program are in compliance with all applicable laws and regulations and

(3) the pilot program consists of a representative and adequate sample of Mexico domiciled carriers likely to engage in cross border operations beyond United States municipalities and commercial zones on the United States Mexico border

(d) In the event that the Secretary of Transportation in any fiscal year seeks to grant operating authority for the purpose of initiating cross border operations beyond United States municipalities and commercial zones on the United States Mexico border either with Mexico domiciled motor coaches or Mexico domiciled commercial motor vehicles carrying placardable quantities of hazardous materials such activities shall be initiated only after the conclusion of a separate pilot program limited to vehicles of the pertinent type Each such separate pilot program shall follow the same requirements and processes stipulated under subsections (a) through (c) of this section and shall be planned, conducted and evaluated in concert with the Department of Homeland Security or its Inspector General as appropriate so as to address any and all security concerns associated with such cross border operations

Public Law No 107-87, § 350, 115 Stat 833, 864 868 provides

DEPARTMENT OF TRANSPORTATION AND RELATED AGENCIES APPROPRIATIONS ACT 2002

December 18, 2001

<< 49 USCA § 13902 NOTE >>

SEC 350 SAFETY OF CROSS-BORDER TRUCKING BETWEEN UNITED STATES AND MEXICO (a) No funds limited or appropriated in this Act may be obligated or expended for the review or processing of an application by a Mexican motor carrier for authority to operate beyond United States municipalities and commercial zones on the United States Mexico border until the Federal Motor Carrier Safety Administration

(1)(A) requires a safety examination of such motor carrier to be performed before the carrier is granted conditional operating authority to operate beyond United States municipalities and commercial zones on the United States- Mexico border

(B) requires the safety examination to include

(i) verification of available performance data and safety management programs

(ii) verification of a drug and alcohol testing program consistent with part 40 of title 49 Code of Federal Regulations

(iii) verification of that motor carrier's system of compliance with hours of service rules including hours of service records

(iv) verification of proof of insurance

(v) a review of available data concerning that motor carrier's safety history and other information necessary to determine the carrier s preparedness to comply with Federal Motor Carrier Safety rules and regulations and Hazardous Materials rules and regulations

(vi) an inspection of that Mexican motor carrier s commercial vehicles to be used under such operating authority, if any such commercial vehicles have not received a decal from the inspection required in subsection (a)(5)

(vii) an evaluation of that motor carrier's safety inspection, maintenance and repair facilities or management systems including verification of records of periodic vehicle inspections

(viii) verification of drivers' qualifications including a confirmation of the validity of the Licencia de Federal de Conductor of each driver of that motor carrier who will be operating under such authority and

(ix) an interview with officials of that motor carrier to review safety management controls and evaluate any written safety oversight policies and practices

(C) requires that
(i) Mexican motor carriers with three or fewer commercial vehicles need not undergo on site safety examination however 50 percent of all safety examinations of all Mexican motor carriers shall be conducted onsite and
(ii) such on site inspections shall cover at least 50 percent of estimated truck traffic in any year
(2) requires a full safety compliance review of the carrier consistent with the safety fitness evaluation procedures set forth in part 385 of title 49 Code of Federal Regulations and gives the motor carrier a satisfactory rating before the carrier is granted permanent operating authority to operate beyond United States municipalities and commercial zones on the United States Mexico border and requires that any such safety compliance review take place within 18 months of that motor carrier being granted conditional operating authority provided that-
(A) Mexican motor carriers with three or fewer commercial vehicles need not undergo onsite compliance review however 50 percent of all compliance reviews of all Mexican motor carriers shall be conducted on site and
(B) any Mexican motor carrier with 4 or more commercial vehicles that did not undergo an on-site safety exam under (a)(1)(C) shall undergo an on site safety compliance review under this section
(3) requires Federal and State inspectors to verify electronically the status and validity of the license of each driver of a Mexican motor carrier commercial vehicle crossing the border,
(A) for every such vehicle carrying a placardable quantity of hazardous materials
(B) whenever the inspection required in subsection (a)(5) is performed and
(C) randomly for other Mexican motor carrier commercial vehicles but in no case less than 50 percent of all other such commercial vehicles
(4) gives a distinctive Department of Transportation number to each Mexican motor carrier operating beyond the commercial zone to assist inspectors in enforcing motor carrier safety regulations including hours of-service rules under part 395 of title 49 Code of Federal Regulations
(5) requires with the exception of Mexican motor carriers that have been granted permanent operating authority for three consecutive years
(A) inspections of all commercial vehicles of Mexican motor carriers authorized or seeking authority to operate beyond United States municipalities and commercial zones on the United States-Mexico border that do not display a valid Commercial Vehicle Safety Alliance inspection decal, by certified inspectors in accordance with the requirements for a Level I Inspection under the criteria of the North American Standard Inspection (as defined in section 350 105 of title 49 Code of Federal Regulations) including examination of the driver vehicle exterior and vehicle under carriage
(B) a Commercial Vehicle Safety Alliance decal to be affixed to each such commercial vehicle upon completion of the inspection required by clause (A) or a re inspection if the vehicle has met the criteria for the Level I inspection and
(C) that any such decal when affixed expire at the end of a period of not more than 90 days but nothing in this paragraph shall be construed to preclude the Administration from requiring reinspection of a vehicle bearing a valid inspection decal or from requiring that such a decal be removed when a certified Federal or State inspector determines that such a vehicle has a safety violation subsequent to the inspection for which the decal was granted

(6) requires State inspectors who detect violations of Federal motor carrier safety laws or regulations to enforce them or notify Federal authorities of such violations
(7)(A) equips all United States Mexico commercial border crossings with scales suitable for enforcement action, equips 5 of the 10 such crossings that have the highest volume of commercial vehicle traffic with weigh in motion (WIM) systems ensures that the remaining 5 such border crossings are equipped within 12 months requires inspectors to verify the weight of each Mexican motor carrier commercial vehicle entering the United States at said WIM equipped high volume border crossings and
(B) initiates a study to determine which other crossings should also be equipped with weigh in motion systems
(8) the Federal Motor Carrier Safety Administration has implemented a policy to ensure that no Mexican motor carrier will be granted authority to operate beyond United States municipalities and commercial zones on the United States Mexico border unless that carrier provides proof of valid insurance with an insurance company licensed in the United States
(9) requires commercial vehicles operated by a Mexican motor carrier to enter the United States only at commercial border crossings where and when a certified motor carrier safety inspector is on duty and where adequate capacity exists to conduct a sufficient number of meaningful vehicle safety inspections and to accommodate vehicles placed out of service as a result of said inspections
(10) publishes
(A) interim final regulations under section 210(b) of the Motor Carrier Safety Improvement Act of 1999 (49 U S C 31144 note) that establish minimum requirements for motor carriers including foreign motor carriers to ensure they are knowledgeable about Federal safety standards that may include the administration of a proficiency examination
(B) interim final regulations under section 31148 of title 49 United States Code that implement measures to improve training and provide for the certification of motor carrier safety auditors
(C) a policy under sections 218(a) and (b) of that Act (49 U S C 31133 note) establishing standards for the determination of the appropriate number of Federal and State motor carrier inspectors for the United States-Mexico border
(D) a policy under section 219(d) of that Act (49 U S C 14901 note) that prohibits foreign motor carriers from leasing vehicles to another carrier to transport products to the United States while the lessor is subject to a suspension restriction or limitation on its right to operate in the United States and
(E) a policy under section 219(a) of that Act (49 U S C 14901 note) that prohibits foreign motor carriers from operating in the United States that is found to have operated illegally in the United States
(b) No vehicles owned or leased by a Mexican motor carrier and carrying hazardous materials in a placardable quantity may be permitted to operate beyond a United States municipality or commercial zone until the United States has completed an agreement with the Government of Mexico which ensures that drivers of such vehicles carrying such placardable quantities of hazardous materials meet substantially the same requirements as United States drivers carrying such materials

(c) No vehicles owned or leased by a Mexican motor carrier may be permitted to operate beyond United States municipalities and commercial zones under conditional or permanent operating authority granted by the Federal Motor Carrier Safety Administration until
(1) the Department of Transportation Inspector General conducts a comprehensive review of border operations within 180 days of enactment to verify that -
(A) all new inspector positions funded under this Act have been filled and the inspectors have been fully trained,
(B) each inspector conducting on site safety compliance reviews in Mexico consistent with the safety fitness evaluation procedures set forth in part 385 of title 49 Code of Federal Regulations is fully trained as a safety specialist
(C) the requirement of subparagraph (a)(2) has not been met by transferring experienced inspectors from other parts of the United States to the United States Mexico border undermining the level of inspection coverage and safety elsewhere in the United States
(D) the Federal Motor Carrier Safety Administration has implemented a policy to ensure compliance with hours of service rules under part 395 of title 49, Code of Federal Regulations, by Mexican motor carriers seeking authority to operate beyond United States municipalities and commercial zones on the United States Mexico border
(E) the information infrastructure of the Mexican government is sufficiently accurate accessible, and integrated with that of United States enforcement authorities to allow United States authorities to verify the status and validity of licenses vehicle registrations operating authority and insurance of Mexican motor carriers while operating in the United States and that adequate telecommunications links exist at all United States Mexico border crossings used by Mexican motor carrier commercial vehicles and in all mobile enforcement units operating adjacent to the border to ensure that licenses vehicle registrations operating authority and insurance information can be easily and quickly verified at border crossings or by mobile enforcement units
(F) there is adequate capacity at each United States Mexico border crossing used by Mexican motor carrier commercial vehicles to conduct a sufficient number of meaningful vehicle safety inspections and to accommodate vehicles placed out of service as a result of said inspections
(G) there is an accessible database containing sufficiently comprehensive data to allow safety monitoring of all Mexican motor carriers that apply for authority to operate commercial vehicles beyond United States municipalities and commercial zones on the United States Mexico border and the drivers of those vehicles and
(H) measures are in place to enable United States law enforcement authorities to ensure the effective enforcement and monitoring of license revocation and licensing procedures of Mexican motor carriers
(2) The Secretary of Transportation certifies in writing in a manner addressing the Inspector General's findings in paragraphs (c)(1)(A) through (c)(1)(H) of this section that the opening of the border does not pose an unacceptable safety risk to the American public
(d) The Department of Transportation Inspector General shall conduct another review using the criteria in (c)(1)(A) through (c)(1)(H) consistent with paragraph (c) of this section 180 days after the first review is completed and at least annually thereafter
(e) For purposes of this section the term 'Mexican motor carrier" shall be defined as a Mexico domiciled motor carrier operating beyond United States municipalities and commercial zones on the United States Mexico border

(f) In addition to amounts otherwise made available in this Act to be derived from the Highway Trust Fund there is hereby appropriated to the Federal Motor Carrier Safety Administration $25 866,000 for the salary, expense and capital costs associated with the requirements of this section

49 U S C § 31315 provides

§ 31315 Waivers, exemptions, and pilot programs

(a) Waivers The Secretary may grant a waiver that relieves a person from compliance in whole or in part with a regulation issued under this chapter or section 31136 if the Secretary determines that it is in the public interest to grant the waiver and that the waiver is likely to achieve a level of safety that is equivalent to or greater than the level of safety that would be obtained in the absence of the waiver

(1) for a period not in excess of 3 months

(2) limited in scope and circumstances

(3) for nonemergency and unique events and

(4) subject to such conditions as the Secretary may impose

(b) Exemptions -

(1) In general Upon receipt of a request pursuant to paragraph (3) the Secretary of Transportation may grant to a person or class of persons an exemption from a regulation prescribed under this chapter or section 31136 if the Secretary finds such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption An exemption may be granted for no longer than 2 years from its approval date and may be renewed upon application to the Secretary

(2) Authority to revoke exemption - The Secretary shall immediately revoke an exemption if

(A) the person fails to comply with the terms and conditions of such exemption

(B) the exemption has resulted in a lower level of safety than was maintained before the exemption was granted or

(C) continuation of the exemption would not be consistent with the goals and objectives of this chapter or section 31136 as the case may be

(3) Requests for exemption Not later than 180 days after the date of enactment of this section and after notice and an opportunity for public comment the Secretary shall specify by regulation the procedures by which a person may request an exemption Such regulations shall at a minimum, require the person to provide the following information for each exemption request

(A) The provisions from which the person requests exemption

(B) The time period during which the requested exemption would apply

(C) An analysis of the safety impacts the requested exemption may cause

(D) The specific countermeasures the person would undertake to ensure an equivalent or greater level of safety than would be achieved absent the requested exemption

(4) Notice and comment -

(A) Upon receipt of a request Upon receipt of an exemption request, the Secretary shall publish in the Federal Register a notice explaining the request that has been filed and shall give the public an opportunity to inspect the safety analysis and any other relevant information known to the Secretary and to comment on the request This subparagraph does not require the release of information protected by law from public disclosure

(B) Upon granting a request Upon granting a request for exemption the Secretary shall publish in the Federal Register the name of the person granted the exemption the provisions from which the person will be exempt the effective period and all terms and conditions of the exemption

(C) After denying a request After denying a request for exemption, the Secretary shall publish in the Federal Register the name of the person denied the exemption and the reasons for such denial The Secretary may meet the requirement of this subparagraph by periodically publishing in the Federal Register the names of persons denied exemptions and the reasons for such denials

(5) Applications to be dealt with promptly The Secretary shall grant or deny an exemption request after a thorough review of its safety implications but in no case later than 180 days after the filing date of such request

(6) Terms and conditions The Secretary shall establish terms and conditions for each exemption to ensure that it will likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption The Secretary shall monitor the implementation of the exemption to ensure compliance with its terms and conditions

(7) Notification of state compliance and enforcement personnel - Before granting a request for exemption the Secretary shall notify State safety compliance and enforcement personnel including roadside inspectors and the public that a person will be operating pursuant to an exemption and any terms and conditions that will apply to the exemption

(c) Pilot programs

(1) In general - The Secretary may conduct pilot programs to evaluate alternatives to regulations relating to or innovative approaches to, motor carrier commercial motor vehicle, and driver safety Such pilot programs may include exemptions from a regulation prescribed under this chapter or section 31136 if the pilot program contains at a minimum the elements described in paragraph (2) The Secretary shall publish in the Federal Register a detailed description of each pilot program including the exemptions to be considered, and provide notice and an opportunity for public comment before the effective date of the program

(2) Program elements -In proposing a pilot program and before granting exemptions for purposes of a pilot program the Secretary shall require as a condition of approval of the project that the safety measures in the project are designed to achieve a level of safety that is equivalent to or greater than the level of safety that would otherwise be achieved through compliance with the regulations prescribed under this chapter or section 31136 The Secretary shall include at a minimum the following elements in each pilot program plan

(A) A scheduled life of each pilot program of not more than 3 years

(B) A specific data collection and safety analysis plan that identifies a method for comparison

(C) A reasonable number of participants necessary to yield statistically valid findings

(D) An oversight plan to ensure that participants comply with the terms and conditions of participation

(E) Adequate countermeasures to protect the health and safety of study participants and the general public

(F) A plan to inform State partners and the public about the pilot program and to identify approved participants to safety compliance and enforcement personnel and to the public

(3) Authority to revoke participation The Secretary shall immediately revoke participation in a pilot program of a motor carrier commercial motor vehicle or driver for failure to comply with the terms and conditions of the pilot program or if continued participation would not be consistent with the goals and objectives of this chapter or section 31136 as the case may be

(4) Authority to terminate program The Secretary shall immediately terminate a pilot program if its continuation would not be consistent with the goals and objectives of this chapter or section 31136 as the case may be

(5) Report to Congress --At the conclusion of each pilot program, the Secretary shall report to Congress the findings conclusions and recommendations of the program including suggested amendments to laws and regulations that would enhance motor carrier commercial motor vehicle and driver safety and improve compliance with national safety standards

(d) Preemption of state rules - During the time period that a waiver exemption or pilot program is in effect under this chapter or section 31136 no State shall enforce any law or regulation that conflicts with or is inconsistent with the waiver exemption, or pilot program with respect to a person operating under the waiver or exemption or participating in the pilot program